UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

RJR Paratransit Corporation
Employer[1]

and **Case No. 29-RC-9594**

Local 1181-1061, Amalgamated Transit Union, AFL-CIO
Petitioner

and

Local 713, International Brotherhood of Trade Unions
Intervenor

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Haydee Rosario, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The parties stipulated that RJR Paratransit Corporation, herein Employer, a corporation with its principal office and place of business located at

[1] There was testimony that the Employer is also known as Accessoride.

551 Midland Avenue, Staten Island, New York, herein called the Staten Island facility, is engaged in providing transportation services to the disabled. During the preceding twelve months, which period represents its operations in general, the Employer derived gross annual revenues in excess of $250,000 for performance of its services, and, during the same period, purchased and received at its Staten Island facility, goods, supplies and materials valued in excess of $5,000 directly from entities located outside the State of New York.

Based upon the stipulations of the parties, and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organizations involved herein claim to represent certain employees of the Employer.

4. The Petitioner seeks an election in a unit of all drivers and mechanics. The Employer and Intervenor assert that the election is barred by a collective bargaining agreement they entered into on January 19, 2001, which covers the Employer's drivers, mechanics, dispatchers, and maintenance employees.

At the hearing, the Petitioner and Local 807, International Brotherhood of Teamsters, AFL-CIO ("Local 807"), took the position that the contract is not a bar because the Intervenor obtained recognition as the result of obtaining majority status through the solicitation of authorization cards circulated by a

statutory supervisor, Rocco Toto.[2] While the alleged conduct of Toto in this regard cannot be resolved through the conduct of a pre-election representation hearing, his status as a supervisor as defined in Section 2(11) of the Act can be. The Employer and Intervenor maintained that Rocco Toto is not a statutory supervisor, but a maintenance employee, and a member of the unit represented by the Intervenor.

The Petitioner did not call any witnesses, submit documentary evidence, or file a brief, nor did the Intervenor call any witnesses. However, Local 807 offered the testimony of two witnesses in support of Toto's supervisory status, driver John Gamba and maintenance employee/alleged supervisor Rocco Toto.[3] The Employer countered with one witness, Vincent Corley, who is employed as a driver.

As discussed in the prior decision involving the Employer, Case No. 29-RC-8994, by contract with the New York City Transit Authority, the Employer provides mass transit for disabled individuals within the five boroughs of New York City. The Employer uses its own wheelchair accessible vans to provide

[2] Local 807 appeared at the hearing and submitted a post-hearing brief, having filed a petition in Case No. 29-RC-9591 to represent the same driver and mechanic unit as that sought by Local 1181-1061. It subsequently withdrew its petition. Unlike the Petitioner, which relied solely on Rocco Toto's supervisory status, Local 807 took the position that there were several additional reasons that the collective bargaining agreement should not bar an election. For example, Local 807 alleged that the contract was not a bar because it had not been enforced. This allegation was premature. The contract was executed on January 19, 2001, and the hearing took place on February 9, 2001. Under the terms of the contract, a number of provisions, such as check-off, welfare contributions, raises, and the wage rate for new drivers, were not yet in effect as of the hearing date. A collective bargaining agreement does not lose its bar quality unless it has been completely abandoned by the incumbent union for a substantial period of time. *See, e.g., United Artists Communications* 280 NLRB 1056 (1986) (contract not enforced for one year at the relevant location); *America Zootrope Productions*, 207 NLRB 621)(1973) (contract not in effect for over one year); *Tri-State Transportation Co., Inc.,* 179 NLRB 310 (1969)(contract not applied for 1 ½ years).

In light of Local 807's withdrawal of its petition, it is unnecessary to address its allegations in detail.

transportation for disabled passengers to and from their homes. These vehicles have special license plates issued by the New York City Taxi and Limousine Commission (TLC). Each of the drivers employed by the Employer must have a commercials driver's license and a TLC license to operate a revenue vehicle. The Employer also employs mechanics, dispatchers and maintenance employees in the operation of its business.

The record reveals that Toto is a maintenance employee whose duties include washing the Employer's vehicles and transporting them from one location to another, repairing the vehicles, changing the oil, picking up parts, and unloading deliveries. He occasionally answers the telephone in the office when dispatchers are on break, but he does not during these times perform any dispatching duties. He works from 10:00 a.m. until 6:00 p.m., Monday through Friday, and is paid $600 per week. He has been employed by the Employer for three years.

The burden of proving that an employee is a statutory supervisor is on the party alleging such status, and the burden is a heavy one in light of the exclusion of supervisors from the protection of the Act. *See Chicago Metallic,* 273 NLRB 1677, 1688, 1689 (1985). Section 2(11) of the Act provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

[3] A third Local 807 witness, Vincent Corley, testified about issues other than Rocco Toto's alleged supervisory status.

The possession of any one of these indicia is sufficient to confer supervisory status, but only if the use of this power involves independent judgment. *See Chicago Metallic Corp*., 273 NLRB at 1689 (1985). An individual does not become a supervisor through the exercise of "some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner," or through giving "some instructions or minor orders to other employees." *Chicago Metallic*, 273 NLRB at 1689. Serving as a conduit for management's instructions or for the assignment of predetermined tasks, without more, is not a supervisory function. *See McCollough Environmental Services,* 306 NLRB 1565, 1566 (1992); *see also Quadrex Environmental Co.,* 308 NLRB 101 (1992). The Board will not find an employee to be a supervisor solely because s/he occasionally assigns work to other employees on an emergency basis, even if the assignment is made without consulting with management. *See Quadrex*, 308 NLRB at 101 (emergency assignment of overtime). An employee who inspects the work of others and either reports on improper work performance, or orders employees with performance problems to leave a work-site, is not a supervisor unless s/he has the authority to effectuate ultimate personnel decisions. *See Somerset Welding and Steel*, 291 NLRB 913, 914 (1988); *see also Quadrex*, 308 NLRB at 101. The bare title of "supervisor" is of minimal probative value. *See Chicago Metallic,* 273 NLRB at 1689.

The testimonies of John Gamba, Rocco Toto, and Louis Aloi were identical in one significant respect: when they were asked specifically whether Toto has the authority to hire, suspend, or discharge employees, or exercise any

other supervisory power enumerated in Section 2(11) of the Act, the response from all witnesses was that he did not. The testimony offered by witnesses called by Local 807 fell far short of establishing Toto's supervisory status. For example, Local 807 provided evidence that in one instance, Richard Salamone, the owner of the company, directed Toto to ask another employee for monetary receipts he owed the company. When Toto complied, he was merely acting as a conduit for management's instructions, and not as a supervisor. *See, e.g., McCollough Environmental Services,* 306 NLRB at 1566. On another occasion, Toto testified that he told the mechanic on duty that one of the Employer's vehicles had a broken windshield. The mechanic subsequently ordered a new one. Even if this incident amounts to a work assignment, the occasional assignment of work on an emergency basis does not elevate an employee to the supervisory ranks. *See, e.g., Quadrex*, 308 NLRB at 101. The mere notification to a fellow employee of a problem with a piece of equipment by itself hardly rises to the level of the discretionary assignment of work envisioned by the statute.

Similarly, twice within the past year, the Employer's operations manager directed Toto to administer random breathalyzer tests to employees whose names "came up on the computer." If an employee failed the test, Toto wrote that on a form and gave it to Salamone. However, in the absence of authority to effectuate ultimate personnel decisions based on the results of the test, simply administering the test did not transform Toto into a supervisor. *See Somerset Welding and Steel*, 291 NLRB at 914; *Quadrex*, 308 NLRB at 101. Lastly, Local 807 offered testimony that about one to three times per month, Toto had relieved

dispatchers who were taking breaks. However, there is no evidence that Toto ever exercised supervisory authority while relieving the dispatchers, and the Employer's dispatchers were not found to be supervisors in a previous case involving this Employer. *RJR Paratransit Corporation,* Case No. 29-RC-8994.

Based on the foregoing, I conclude that the Petitioner has not met its burden of proving that Rocco Toto is a supervisor as defined in Section 2(11) of the Act. Further, I find the petition to be barred by the collective bargaining agreement between the Employer and the Intervenor. I am therefore dismissing the petition.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 29-RC-9594 be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by April 11, 2001.

Dated at Brooklyn, New York, this 28th day of March, 2001.

/S/ John Walsh

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John Walsh
Acting Regional Director, Region 29
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